Ah San @ Goh Ah Soon v Majlis Bandaraya Ipoh

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–462 OF 2004
VT SINGHAM J
27 JULY 2005

Administrative Law — Remedies — Mandamus — Application for an order for the defendant to issue the Certificate of Fitness to the plaintiff's shop building — Prerequisites to an order of mandamus — Whether leave has been obtained — Rules of the High Court 1980 O 53 r 3

Administrative Law — Remedies — Mandamus — Delay in taking action — Whether application time barred — Public Authorities Protection Act 1948 s 2(a) —

Administrative Law — Remedies — Mandamus — Conditions to be satisfied — Whether failure to disclose of civil suit filed at High Court in equitable — Whether application for mandamus an abuse of process of court — Specific Relief Act 1950 s 44(1)

The plaintiff was registered as the owner of the shop lot, being the subject matter of the land. The plaintiff submitted her building plans to the defendant, for approval to rebuild her shop. The 'Land reserve' adjacent to the plaintiff's land was alienated by the State Authority to the 2nd defendant. The adjoining land owner submitted its building plans to the defendant for its approval. The plaintiff's plans were approved by the defendant. About 3 months later, the building plans submitted by adjoining land owner was approved by the defendant. The plaintiff began construction of her shop. The plaintiff then filed a writ of summons vide Civil Suit No 22–88 of 1997 at the High Court and an application for an injunction against the adjoining landowner and its contractor from proceeding to put up a building on their land as per the plan approved by the defendant. The High Court dismissed the plaintiff's application for the injunction. The plaintiff filed a Notice of Appeal to the Court of Appeal against the decision of the High Court. In the meantime, construction of the plaintiff's shop was completed. The Court of Appeal dismissed the plaintiff's appeal. The plaintiff's application for leave was refused by the Federal Court. In this case, the plaintiff had, inter alia, applied to the court for an order of mandamus against the defendant, pursuant to s 44(1) of the Specific Relief Act 1950 ('the Act') to issue the Certificate of Fitness to the plaintiff's shop building within 10 days from the date of the order to be made by the court.

Held, dismissing the plaintiff's application:

(1) The plaintiff's redress, against the alleged refusal, omission or neglect by the defendant to issue the certificate of fitness is not by way of an appeal to the Appeal Board pursuant to s 23 of the Town and Country Planning Act 1976 but rightfully by an order of mandamus to compel the defendant, as Local Authority to perform its statutory duty but subject to leave having been

obtained. However, the application for an order of mandamus was not properly made as no leave has been obtained as provided under O 53 r 3 of the Rules of the High Court 1980 before applying to the court to grant the order of mandamus (see paras 8–9).

(2) The plaintiff was guilty of inordinate delay in filling this application for an order of mandamus. The application against the defendant was time barred by virtue of s 2(a) of the Public Authorities Protection Act 1948 (see para 12).

(3) The conduct of the plaintiff had been inequitable in failing to disclose to the court of the Civil Suit No 22–88 of 1997 filed at the High Court against the defendant, in respect of the same subject matter of the land wherein the plaintiff's application for injunction against the registered owners of the adjoining land and its contractors from proceeding with the construction of the shop building on the land was dismissed by the High Court and subsequently confirmed by the Court of Appeal. On the facts and circumstances, there had been unconscionable conduct on the part of the plaintiff (see para 12).

(4) There was an admission on behalf of the plaintiff that the relief sought by this application could have been included in the Civil Suit No 22–88 of 1997 but regrettably, the plaintiff still chose to file a separate and fresh mode of proceeding for this court to issue an order of mandamus against the defendant and this was certainly not encouraged and tantamount to an abuse of the process of the court and would lead to duplicity or multiplicity of proceedings and embarrassment in the proceedings on the same subject matter of the land which has already been authoritatively decided by another court of co-ordinate jurisdiction on the injunction whose decision has been confirmed by the Court of Appeal. The process or machinery of the court should not be used improperly or abused (see paras 21–22).

[Bahasa Malaysia summary

Plaintif telah didaftarkan sebagai pemilik kepada satu lot kedai, iaitu perkara subjek bagi tanah. Plaintif mengemukakan pelan bangunan kepada defendan, untuk kelulusan bagi membina semula kedainya. 'Tanah rezab' yang bersebelahan dengan tanah plaintif telah diberi milik oleh kerajaan negeri kepada defendan kedua. Pemilik tanah yang bersebelahan menyerahkan pelan bangunannya kepada defendan untuk kelulusan. Pelan plaintif telah diluluskan oleh defendan. Lebih kurang tiga bulan kemudian, pelan bangunan yang diserahkan oleh pemilik tanah yang bersebelahan telah diluluskan oleh defendan. Plaintif memulakan pembinaan kedainya. Plaintif kemudiannya telah memfailkan satu writ saman melalui Tindakan Sivil No 22–88 of 1997di Mahkamah Tinggi dan satu permohonan bagi injunksi terhadap pemilik tanah sebelah dan kontraktornya daripada membina bangunan di atasnya tanah mereka sebagaimana pelan yang telah diluluskan oleh defendan. Mahkamah Tinggi telah menolak permohonan plaintif untuk mendapatkan injunksi. Plaintif memfailkan notis rayuan ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Pada masa yang sama, pembinaan kedai plaintif telah selesai. Mahkamah Rayuan menolak rayuan plaintif. Permohonan plaintif untuk mendapatkan kebenaran telah ditolak oleh Mahkamah Persekutuan. Dalam kes ini, plaintif telah,

A inter alia, memohon perintah mandamus terhadap defendan, menurut s 44(1) Akta Relif Spesifik 1950 ('Akta tersebut') untuk mengeluarkan Sijil Pendudukan bagi bangunan kedai plaintif dalam masa 10 hari daripada tarikh perintah yang dikeluarkan oleh mahkamah.]

B

Diputuskan, menolak permohonan plaintif:

(1) Langkah membetulkan bagi plaintif, terhadap keengganan, ketinggalan dan pengabaian yang didakwa telah dilakukan oleh defendan dalam mengeluarkan Sijil Pendudukan bukanlah dengan cara membuat rayuan ke Lembaga Rayuan
C menurut s 23 Akta Perancangan Bandar dan Desa 1976 tetapi dengan mendapatkan perintah mandamus untuk membuat defendan, sebagai pihak berkuasa tempatan untuk menjalankan tanggungjawab statutorinya setelah mendapatkan kebenaran. Walau bagaimanapun, permohonan untuk mendapatkan perintah mandamus tidak dibuat dengan betul kerana tiada
D kebenaran telah diperoleh sepertimana yang dinyatakan dalam A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 sebelum memohon kepada mahkamah untuk mendapatkan perintah mandamus (lihat perenggan 8–9).

(2) Plaintif bersalah kerana terdapat kelewatan yang melampau dalam memfailkan permohonan ini untuk mendapatkan perintah mandamus. Permohonan terhadap defendan telah lewat masa mengikut s 2(a) Akta Perlindungan Pihak
E Berkuasa Awam 1948 (lihat perenggan 12).

(3) Kelakuan plaintif adalah tidak adil kerana gagal untuk memaklumkan mahkamah berkenaan dengan Tindakan Sivil No 22-88 tahun 1997 yang telah difailkan di Mahkamah Tinggi terhadap defendan, berkenaan dengan perkara subjek yang sama yang mana permohonan plaintif untuk mendapatkan
F injunksi terhadap pemilik berdaftar tanah yang bersebelahan dan kontraktornya daripada meneruskan pembinaan bangunan kedai di atas tanahnya telah ditolak oleh Mahkamah Tinggi dan seterusnya telah disahkan juga oleh Mahkamah Rayuan. Berdasarkan fakta-fakta dan keadaan tersebut, terdapat tindakan tidak wajar yang telah dilakukan oleh plaintif (lihat
G perenggan 12).

(4) Terdapat pengakuan bagi pihak plaintif bahawa relif yang dipohon melalui permohonan ini sebenarnya boleh dimasukkan bersama dalam Tindakan Sivil No 22–88 tahun 1997 tetapi malangnya, plaintif masih memilih untuk memfailkan prosiding baru dan berasingan bagi mahkamah ini untuk
H mengeluarkan perintah mandamus terhadap defendan dan tindakan ini sememangnya tidak digalakkan dan adalah merupakan salah guna proses mahkamah dan akan membawa kepada penggandaan dan penduaan prosiding dan limpahan prosiding bagi perkara subjek yang sama yang telah diputuskan secara autoritatif oleh mahkamah lain yang mempunyai bidang kuasa yang
I sama berkenaan dengan injunksi yang keputusannya telah disahkan oleh Mahkamah Rayuan. Proses atau jentera mahkamah tidak sepatutnya digunakan secara tidak wajar atau disalahgunakan (lihat perenggan 21–22).

Notes

For cases on mandamus, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 554–583.

Cases referred to

Abdul Malik bin Abdul Majid v Asnah bte Hamid & Anor; Dagang bin Bachik v Abdul Malik bin Abdul Majid [1985] 2 MLJ 459 (refd)
Ah San @ Goh Ah Soon v Majlis Bandaraya Ipoh & Ors [2000] 1 MLJ 615 (refd)
Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241 (refd)
Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)
Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)
Attorney-General of Hongkong v Ng Yuen Shiu [1983] 2 AC 629 (refd)
R v Wear Valley DC; ex p Sinks [1985] 2 All ER 699 (refd)
Barraclough v Brown [1897] AC 613 (refd)
Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors [1999] 2 MLJ 385 (refd)
Carl-Zeiss-in Stiftung v Herbert Smith & Co (a firm) [1968] 2 All ER 1002 (refd)
Chan Mun Poy v Director-General of Telecomunications & Anor [1981] 2 MLJ 293 (refd)
Co-operative Retail Services Ltd v Secretary of State for the Environment & Ors [1980] 1 All ER 449 Dawkins v Prince Adward of Saxe of Wiemar [1975–76] 1 QBD 499 (refd)
Erlanger v New Sombrero 3 App Case 1218 (refd)
Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 (refd)
Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Seng & Anor [1985] 2 MLJ 380 (refd)
Findlay, Re [1985] AC 318 (refd)
Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 MLJ 198 (refd)
Hall and Co Ltd v Shoreham by-Sea Urban District Council [1964] 1 WLR 240 (refd)
JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 (refd)
Jatindra Mohan Sen Gupta; In Re (1925) Calcutta 48 (refd)
Kingston-upon-Thames Royal London Borough Council v Secretary of State for the Environment [1973] 1 WLR 1549 (refd)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180 (refd)
Law Pang Ching & Ors v Tawau Municipal Council [2003] 3 MLJ 326 (refd)
Lee Kean Lum v Penolong Pendaftar Perniagaan Utara Alor Setar [1994] 3 CLJ 278 (refd)
Loh Wai Kong v Government of Malaysia & Ors [1978] 2 MLJ 175 (refd)
Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal [2000] 2 MLJ 257 (refd)
Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd [1996] 3 MLJ 94 (refd)
Mansor bin Mat Tahir v Kadi Daerah Pendang, Kedah & Anor [1989] 1 MLJ 106 (refd)
Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis & Anor [2002] 4 MLJ 105 (refd)
Metal Industry Employees Union v Registrar of Trade Unions & Ors [1976] 1 MLJ 220 (refd)
Ng Bee v Chairman, Town Council, Kuala Pilah [1975] 1 MLJ 273 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

A *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 322 (refd)
Pasmore & Ors v The Oswaldtwistle Urban District Council [1898] AC 387 (refd)
Pyx Granite Co Limited v Ministry of Housing and Local Government [1958] 1 QB 554 (refd)
B *Queen, The v Church Warden of All Saints, Wigan & Ors* [1876] HL (E) Vol 1 611 (refd)
R v Chief Immigration Officer Get Wich Air Port; ex p Kharrozi [1980] 3 All ER 373 (refd)
R v Epping and Harlow General Commissioners; ex p Gold Straw [1982] 3 All ER 257
C (refd)
R v Panel on Take-Overs and Mergers; ex p Guinness PLC [1990] 1 QB 146 (refd)
R v Secretary of States; ex p Kirk Stall Valley Co Ltd [1996] 3 All ER 304 (refd)
R v Secretary of State for the Home Department; ex p Swati [1986] 2 All ER 717 (refd)
R v Senate of University of Aston [1969] 2 All ER 964 (refd)
D *R v The Brecnock and Abergavenny Canal Co* 111 ER 395 (refd)
Saundres v The Holborne District Board of Works [1895] 1 QB 63 (refd)
Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346 (refd)
Schmidt & Anor v Secretary of Stated for Home Affair [1969] 2 Ch 149 (refd)
E *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 (refd)
Thein Tham Sang v United States Army Medical Research Unit & Anor [1983] 1 MLJ 97 (refd)
Wilkinson v Banking Corporation [1948] 1 KB 721 (refd)
Workon Sdn Bhd v The Director of Lands and Survey, Sabah [1999] 4 MLJ 177 (refd)
F

Legislation referred to

Courts of Judicature Act 1964 s 25
Local Government Act 1976 s 13
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 53 rr 1(1), 3
G Specific Relief Act 1950 s 44(1)
Street, Drainage and Building Act 1974 s 25(1)
Town and Country Planning Act 1976 ss 22(3), 23, 25
Uniform Building By-Laws 1984 ss 7(1)(a), (3), 25(1)

H *Chan Kok Keong (Chan & Associates) for the plaintiff.*
A Silvanathan (Kean Chye & Sivalingam) for the defendant.

VT Singham J:

I

[1] By an originating summons dated 6 April 2004 (encl 1), the plaintiff has inter alia applied to this court for an order of mandamus against Majlis Bandaraya Ipoh, the defendant, pursuant to s 44(1) of the Specific Relief Act 1950 to issue the Certificate of Fitness to the plaintiff's shop building within 10 days from the date of the order to be made by the court.

The plaintiff has applied for the following order:

1 defendan mengeluarkan Sijil Pendudukan seperti yang ianya patut menurut undang-undang dalam masa 10 hari dari tarikh perintah yang akan dibuat di sini;

2 kerugian untuk ditaksirkan;

3 ganti rugi teladan; dan

4 kos.

[2] By an affidavit affirmed on 5 April 2004 (encl 2), the plaintiff has stated as follows:

1 Saya adalah pemilik berdaftar bagi kesemua hartanah yang terletak di bawah HSM 12256 Lot No PT 496, Mukim Hulu Kinta, Daerah Kinta, Negeri Perak Darul Ridzuan ('hartanah tersebut').

2 Defendan adalah suatu badan korporat menurut s 13 Akta Kerajaan Tempatan 1976.

3 Pada 23 November 1995, saya telah menyerahkan satu pelan cadangan bangunan kepada defendan untuk kelulusan bangunan. Pelan tersebut telah diluluskan oleh defendan pada 24 September 1996 melalui rujukan no MBI/F218/160/2655/95.

4 Pembinaan telah bermula pada Ogos 1997 dan bangunan tersebut telah disiapkan dalam Februari 1998. Bangunan ini sekarang adalah sebuah rumah kedai dengan alamat di Lot 496, Gunung Rapat New Village.

5 Pada 14 Oktober 1998, Yap Boon Foh ('Encik Yap') seorang yang berkelayakan memohon untuk Sijil Pendudukan di bawah Undang-Undang Kecil 25(i) Bangunan Seragam 1984. Satu salinan permohonan tersebut ditunjukkan kepada saya dan ditandakan sebagai eksh 'AS-1'.

6 Walaupun Encik Yap telah membuat perakuan bahawa bangunan tersebut telah, antara lain, disiapkan berdasarkan pelan yang telah diluluskan, defendan telah menolak dan seterusnya enggan mengeluarkan Sijil Pendudukan untuk kenikmatan hartanah-hartanah tersebut.

7 Saya telah dinasihati oleh peguamcara saya dan sesungguhnya percaya bahawa kegagalan defendan atau dengan sengaja enggan mengeluarkan Sijil Pendudukan adalah merupakan suatu kemungkiran kewajipan. Ini telah menyebabkan suatu kehilangan dan kerugian kerana saya tidak dapat menyewakan hartanah tersebut.

8 Tindak-tanduk defendan yang tidak wajar ini juga telah menyebabkan penderitaan dan penyeksaan mental. Berdasarkan umur saya, saya telah berhenti bekerja dan berharap untuk menikmati pendapatan daripada sewaan hartanah tersebut.

9 Oleh itu, saya memohon perintah seperti dipohon dalam Saman Pemula yang difailkan di sini.

[3] However, before considering the application (encl 1) in the instant case, it is to be observed that the following facts are not in dispute and in order to obtain a proper perspective of the said application, it is important to set out in a chronological order the sequence of events as obtained from the relevant documents and written submissions filed by both parties and which is as follows:

A Brief Chronology of Events

Date	Particulars
1) 24 June 1979	The plaintiff was registered as the owner of the shop lot, being the subject matter of the land.
2) Nov 1995	The plaintiff submitted her building plans to the defendant, Majlis Perbandaran, for approval to rebuild her shop.
3) 3 May 1996	The 'Land reserve' adjacent to the plaintiff s land was alienated by the State Authority to Angkasamas Sdn Bhd, the second defendant in Civil Suit No 22–88 of 1997 which was filed subsequently by the plaintiff against the Majlis Bandaraya as the first defendant and the Angkasamas Sdn Bhd as second defendant.
4) 23 November 1995	the adjoining land owner submitted its building plans to the defendant, the Majlis Bandaraya for its approval.
5) 24 September 1996	The plaintiff's plans were approved by the defendant, Majlis Bandaraya.
6) 24 December 1996	About three months later, the building plans submitted by adjoining land owner was approved by the defendant, Majlis Bandaraya.
7) April 1997	The plaintiff began construction of her shop.
8) 18 July 1997	The plaintiff filed the Writ of Summons vide Civil Suit No 22-88-97 at the High Court Ipoh and an application for an injunction against the adjoining landowner and its contractor from proceeding to put up a building on their land as per the plan approved by the defendant, Majlis Bandaraya.
9) 18 August 1997	The High Court dismissed the plaintiff's application for the injunction.

10) 22 August 1997	The plaintiff filed Notice of Appeal to the Court of Appeal against the decision of the High Court.
11) Feb 1998	Construction of the plaintiffs shop completed.
12) 19 January 1998	The Court of Appeal dismissed the plaintiff's appeal against the decision of the High Court (see *Ah San @ Goh Ah Soon v Majlis Bandaraya Ipoh & Ors* [2000] 1 MLJ 615).
13) 17 February 1998	The plaintiff filed an application to the Federal Court for leave to appeal against the decision of the Court of Appeal.
14) 18 October 2000	Plaintiff's application for leave was refused by the Federal Court.

[4] In answer to the plaintiff's said application (encl 1) and affidavit in support (encl 2) the defendant filed an affidavit in reply (encl 3) through their Architect of the Majlis Bandaraya on behalf of the defendant which states as follows:

(1) I am a qualified architect at Majlis Bandaraya Ipoh and am duly authorised to make this affidavit on behalf of the defendant herein.

(2) I crave leave of this honourable court to refer to the affidavit of the plaintiff (encl 2) affirmed on 5 April 2004 ('the said affidavit') and filed herein.

(3) I am advised by the defendant's solicitors and verily believe that the plaintiff has no cause of action against the defendant and therefore this affidavit in reply is filed without prejudice to the defendant's rights to have the plaintiffs application (encl 1) struck out.

(4) The defendant has no knowledge of the title referred to in para 1 of the said affidavit.

(5) Paragraphs 2 and 3 of the said affidavit are admitted.

(6) As to para 4 of the said affidavit I am advised by the defendant's solicitors and verily believe that the plaintiff had on 18 July 1997 commenced a civil suit against the defendant and 3 others in this honourable court being Suit No 22–88–1997 (hereinafter referred to as 'the said suit'). In the said suit, the plaintiff prayed for a declaration that the planning permission granted to the second defendant in the said suit by the first defendant (MBI) was null and void. The plaintiff also asked for an injunction to restrain the second defendant (the adjoining landowner), the third and the fourth defendants from commencing any construction works. Therefore even before the plaintiff commenced construction as stated in para 4 of the said affidavit, the plaintiff knew that her construction would cause problems to the adjoining landowner and that the plaintiff's building plan permission would need modification.

(7) I am further advised and verily believe that despite express notices by the second defendant in the said suit, the plaintiff continued to ignore the right of the adjoining landowner and proceeded at her own peril to complete construction. I therefore verily believe that the plaintiff cannot rely on her own wrong and expect the Certificate of Fitness for Occupation to be issued as she should have submitted her planning permission for amendment.

(8) I crave leave of this honourable court to refer to the following documents that were filed in court by the relevant parties in the said suit. The said documents are put in a bundle annexed hereto and marked as exh 'MA-1':

(1) plaintiff's affidavit affirmed on 12 July 1997 (encl 2) (CS 22–88–97);

(2) first defendant's (MBI) affidavit in reply affirmed by Dato' Hj Ahmad Salleh on 5 August 1997.

(3) second defendant's affidavit affirmed by Oung Yew Kew on 6 August 1997;

(4) second defendant's affidavit affirmed by Oung Yew Kew on 7 August 1997 (encl 13);

(5) fourth defendant's affidavit by Keong Yook Seong on 8 August 1997;

(6) first defendant's statement of defence and counterclaim dated 11 August 1997 (encl 17);

(7) first defendant's affidavit in reply affirmed by Mohd Bakri on 19 August 1997;

(8) second defendant's further affidavit affirmed by Oung Yew Kew on 29 August 1997;

(9) first defendant's further affidavit by Dato'Ahmad Salleh on 26 September 1997;

(10) I am advised and verily believe that:

(a) The plaintiff's affidavit (encl 2) (CS 22–88–97) clearly shows that she knew of the adjoining landowner's rights;

(b) The photographs mentioned in paras 4 and 5 of the further affidavit of Oung Yew Kew affirmed on 29 August 1997 (CS 22–88–97) clearly show the plaintiff's speedy attempt to construct despite having been informed of the second defendant's rights

(c) The first defendant's further affidavit affirmed by Dato' Hj Ahmad Salleh on 16 September 1997 clearly shows that the defendant has informed that the plaintiff should not proceed further with the construction as her construction would encroach upon the adjoining lot which has been alienated by the state.

(11) In the circumstances the plaintiff should not be entitled to the prayer for Certificate of Fitness for Occupation (OS 24-462-04) as the plaintiff chose to act to her detriment without due regard for the rights of the adjoining owner.

(12) I am further advised and verily believe that the plaintiff's application for an injunction against the adjoining landowner in the said suit was dismissed by this honourable court and confirmed by the Court of Appeal. I verily believe that the Federal Court has also refused the plaintiff leave to appeal.

(13) As to para 5 of the said affidavit, I am advised and verily believe that the defendant has no knowledge of the following:

(a) that Yap Boon Foh is a qualified person approved by the defendant.

(b) the said Yap Boon Foh has submitted an application for a Certificate of Fitness for Occupation ('CFO').

(14) I am advised and verily believe that the draughtsman who submitted the Form A and Form B with regard to the building permission was one K Kasi. The defendant has no knowledge of the substitution of the draughtsman nor has the defendant consented to the same. In the circumstances, I verily believe that the allegation by the plaintiff that the plaintiff has properly submitted an application for CFO is misconceived.

(15) As to para 6 of the said affidavit, I am advised and I verily believe that the defendant has not rejected the application for CFO as there is no proper application in the first place and in any event for reasons stated above the CFO cannot be granted without modification of the plaintiff's building.

(16) I am further advised and verily believe that the defendant could not have issued the CFO in any event as the plaintiff's lease expired on 30 January 1999.

(17) As to para 7 and 8 of the said affidavit. I verily believe that the defendant has good reasons for not issuing the CFO and the defendant will deny any loss or damage suffered by the plaintiff and would aver that if there was any loss or damage at all, it was brought about by the plaintiff's own conduct.

(18) I am advised by the defendant's solicitors and verily believe that in another related matter, ie Civil Suit No 22–88 of 1997, despite the defendant having served a s 25 notice, the plaintiff in that case has refused to modify and has filed an application for an injunction to stop the defendant from carrying out demolition works and the solicitors who are acting in that case are the same solicitors acting in this case.

[5] On the following questions raised by this court, the plaintiff's counsel submitted as follows:

Q1 What are the other remedies available to the plaintiff on the facts and circumstances in this case besides the remedies provided under s 44 of the Specific Relief Act 1950?

A1 The plaintiff has no other specific and adequate remedy. See: s 44(d) of the Specific Relief Act.

Q2 Whether the facts as stated in para 1 to 16 of encl 6 (defendant's written submissions) are agreed?

A2 Only the strictly factual statements as narrated by the defendant's counsel in encl 6 are agreed, and not the self-serving comments and conclusions (mostly in bold and/or underlined) interspersed therein.

Q3 Must paras 6 and 7 of encl 2 (plaintiff's affidavit) be read together?

A3 No. Paragraph 6 is in compliance with s 45 of the Specific Relief Act which requires that 'Every application under s 44 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof.' In addition to the denial of justice, the plaintiff has, in para 7, set out the loss she suffered because of the defendant's breach of duty in not issuing the CFO.

Q4 When Mr Yap submitted the Form E for the Certificate of Fitness of occupation, was s 7 of the Uniform Building By-Laws 1984 complied with by the plaintiff?

A4 Yes. The relevant provision is s 7(3). When the qualified person has died, as in this case, the owner shall as soon as practicable appoint another person to act for him and to submit adequate evidence to the local authority of the circumstances. The plaintiff had appointed Mr Yap as soon as practicable to act for her previous qualified person Mr Kasi, ie the circumstances for the substitution. Contrary to the defendant's submissions, no consent or agreement by the local authority is required.

[6] On the other hand, the defendant's counsel submitted on Question No 4 as follows

Q4 When Mr Yap submitted the Form E for the Certificate of Fitness For Occupation, was s 7 of the Uniform Building By-Laws 1984 complied with by the plaintiff? Section 7 (3) of the Uniform Building By-Laws 1984 reads as follows:

> Where any qualified person who has submitted any plan, drawing or calculation in respect of any building has died or become bankrupt or cannot be found or has been deregistered from the register or for any other reason ceased to practise, the owner or occupier shall as soon as practicable appoint another qualified person to act for him and to submit adequate evidence to the local authority of the circumstances.

A4 No evidence was ever submitted to the defendant of the circumstances seeking the substitution. Therefore there has been non-compliance with s 7(3) of the Uniform Building By-Laws 1984. Further when s 7(3) is read together with s 7(1)(a), it is clear that there can be no substitution without the agreement/consent of the defendant.

> The acceptance of a qualified person is crucial as the Certificate of Fitness for Occupation shall only be given upon the qualified person certifying the proper construction of the subject building (see s 25(1) Uniform Building By-Laws 1984).

DECISION OF THIS COURT

Power of court to grant specific relief

[7] It is trite that powers of the court to grant any specific relief is discretionary and must be exercised in accordance with sound equitable principles (see *Semantan Estate* (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346 and *Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal* [2000] 2 MLJ 257). The power of the High Court to make an order compelling a public officer or a local authority by an order to perform his public or statutory duty is also discretionary (see *Ng Bee v Chairman, Town Council, Kuala Pilah* [1975] 1 MLJ 273; *Mansor bin Mat Tahir v Kadi Daerah Pendang, Kedah & Anor* [1989] 1 MLJ 106). All the conditions as laid down in s 44(1) of the Specific Relief Act 1950 are cumulative and must be fulfilled before the plaintiff can bring her case within the provision of the said section (see *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180 at p 181;*Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175 at p 176; *Thein Tham Sang v United States Army Medical Research Unit & Anor* [1983] 1 MLJ 97; and *Jatindra Mohan Sen Gupta; In Re* (1925) Calcutta 48 at p 52.

On the facts alone as raised in the affidavit (encl 2) in support of the said application, it would appear that the plaintiff has a legal right to seek such an order as aforesaid to command the Majlis Bandaraya, Ipoh, the defendant, who has a legal and statutory duty to issue the Certificate of Fitness if all the conditions and requirements as provided under the law have been complied with by the plaintiff (see *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180; *Ng Bee v Chairman, Town Council, Kuala Pilah* [1975] 1 MLJ 273; *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175; *Workon Sdn Bhd v The Director of Lands and Survey, Sabah* [1999] 4 MLJ 177; and *Jatindra Mohan Sen Gupta; In Re* (1925) Calcutta 48). On the other hand, it is also important to note that there are cases where a statutory body may have infringed a plaintiff's right to enjoyment and yet the plaintiff may be denied the declaratory relief sought upon settled principles which govern the exercise of judicial discretion. One of the cases where the declaratory relief may be refused is where the plaintiff has adequate alternative remedy which he has not resorted to or refused to do so or there have been, as in the instant case, no direct refusal (see *R v The Brecnock and Abergavenny Canal Co* 111 ER 395).

PROCEDURE

[8] As to the procedure adopted by the plaintiff, this court finds that the application for an order of mandamus is not properly made as no leave has been obtained as provided under O 53 r 3 of the Rules of the High Court 1980 before applying to this court to grant the order of mandamus (see O 53 rr 1(1), (3) of the Rules of the High Court 1980 and s 25 read with para 1 of the schedule to the Courts of Judicature Act 1964). It is only appropriate to distinguish at this stage that the relief sought by the plaintiff by this said originating summons (encl 1) is a substantive relief under the Specific Relief Act 1950 but however the leave to be obtained which is clearly spelt out in O 53 r 1(1) and 3 of the Rules of the High Court 1980 is procedural in nature and must be so construed and should not be mixed up.

Therefore, the contention on behalf of the plaintiff that O 53 r 1(1) and 3 of the RHC 1980 is an inferior provision to s 44 of the Specific Relief Act 1950 and therefore the plaintiff can proceed without having had obtained leave is misplaced (see *Chan Mun Poy v Director-General of Telecomunications & Anor* [1981] 2 MLJ 293; *Lee Kean Lum v Penolong Pendaftar Perniagaan Utara Alor Setar* [1994] 3 CLJ 278 at p 280; and *Mansor bin Mat Tahir v Kadi Daerah Pendang, Kedah & Anor* [1989] 1 MLJ 106. See also O 53 r 1(a) of the Rules of the High Court 1980).

[9] This court is also satisfied that the plaintiff's redress, against the alleged refusal, omission or neglect by the defendant to issue the certificate of fitness is clearly not by way of an appeal to the Appeal Board pursuant to s 23 of the Town and Country Planning Act 1976 but rightfully by an order of mandamus to compel the defendant, as Local Authority to perform its statutory duty but subject to leave having been obtained. The relief applied by the plaintiff is against the alleged, omission or neglect on the part of the defendant to issue the Certificate of Fitness and is not on the plans submitted for approval or against the decision of the planning authority (see*Co-operative Retail Services Ltd v Secretary of State for the Environment & Ors* [1980] 1 All ER 449 for the meaning of 'refusal').

[10] As stated above, the appeal provision under s 23 of the Town and Country Planning Act 1976 does not apply to the refusal, omission or neglect by the defendant to issue the Certificate of Fitness for occupation under the Uniform Building By-Laws 1984. Ordinarily, the plaintiff is not precluded from seeking relief in this court being an order of mandamus so long there is strict compliance with the Rules of procedure and the requirements under the Special Relief Act 1950 is satisfied. The statutory appeal provision therefore is not applicable to the relief applied to this court by the plaintiff unless the plaintiff's grievance comes within the ambit of s 22(3) of the Town and Country Planning Act 1976.

[11] However, as for all equitable reliefs, mandamus is pre-eminently a discretionary remedy, it may be refused if another legal remedy is available which is equally beneficial, convenient and effective (see *Semantan Estate* (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; *Workon Sdn Bhd v The Director of Lands and Survey, Sabah* [1999] 4 MLJ 177; *R v Secretary of State for the Home Department; ex p Swati* [1986] 2 All ER 717; *R v Epping and Harlow General Commissioners exp Gold Straw* [1982] 3 All ER 257. See also *R v Chief Immigration Officer Get Wich Air Port; ex p Kharrozi* [1980] 3 All ER 373 and *R v Panel on Take-Overs and Mergers, exp Guinness PLC* [1990] 1 QB 146 at pp 177–178).

[12] On the other hand, even if leave was not required as contended by the learned counsel for the plaintiff and that the plaintiff is entitle to file this application under s 44 of the Specific Act 1950 which this court is not in agreement, the plaintiff's application would still be refused on the totality of the facts, background and circumstances in the instant case, for the following reasons:

(1) the plaintiff is guilty of inordinate delay in filling this application for an order of mandamus (see *Semantan Estate* (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; *Bencon Development Sdn*

Bhd v Majlis Perbandaran Pulau Pinang & Ors [1999] 2 MLJ 385; and *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 9 4 at p 107). Delay is a relevant factor in proceedings for an order of mandamus 'Equity aids the vigilant', and not those who sleep on their rights. 'Vigilantibus', non dormientibus jura subcnient (see *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 and *Erlanger v New Sombrero* 3 App Case 1218 at p 1279.

(1A)There has been unexplained delay by the plaintiff by an affidavit or otherwise for filing this application almost about 5½ years later from the date of submitting the application Form E dated 14 October 1998 (exh 'AS-1') as attached to her affidavit (encl 2) to the defendant. The plaintiff did not explain or disclose all the material circumstances which had resulted to the delay. The plaintiff must explain the reasons for the delay and set out all the facts and circumstances relied upon to obtain this order of mandamus against the defendant. The plaintiff's application therefore, ought to be dismissed on this score of unexplained delay alone (see *Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297 at p 298; *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198 at pp 200–201; *Semantan Estate* (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; and *R v Senate of University of Aston* [1969] 2 All ER 964 at p 979.

(2) The application (encl 1) against the defendant is time barred by virtue of s 2(a) of the Public Authorities Protection Act 1948. In order to determine whether the application is caught by limitation under s 2(a) of the Public Authorities Protection Act 1948, time shall start from the time the defendant had failed to consider the application Form E dated 14 August 1998 (exh AS-1 of encl 2) which was submitted to the defendant or arguably at the time when an application for leave is filed under O 53 r 1(1), (3) of the Rules of the High Court 1980 which was not applied in the instant case. Upon considering the date as stated in the said application Form E and the provisions of s 25(1) of the Street, Drainage and Building Act 1974, this court finds that the application is caught by the three years limitation period under s 2(a) of the Public Authorities Protection Act 1948 and the plaintiff is barred from filing this application in court. Section 2(a) of the Public Authorities Protection Act 1948 read as follows:

> The suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;...

(2A)The cases *Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis & Anor* [2002] 4 MLJ 105 and Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241 referred to by learned counsel for the plaintiff are not of much assistance to support the argument that the plaintiff is not caught by s 2(a) of the Public Authorities Protection Act 1948 as this court is of the view that the facts and circumstances in the said two cases cited by the plaintiff counsel are poles apart and is distinguishable on its own set of facts when compared to the facts and circumstances in the instant case.

(3) the conduct of the plaintiff has been inequitable in failing to disclose to this court of the Civil Suit No 22–88 of 1997 filed at the High Court, Ipoh against the defendant, the Majlis Perbandaran and three others, in respect of the same subject matter of the land wherein the plaintiff's application for injunction against the registered owners of the adjoining land and its contractors from proceeding with the construction of the shop building on the land was dismissed by the High Court Ipoh on 18 August 1997 and subsequently confirmed by the Court of Appeal on 19 January 1998 (see para 6-16 of the defendant's affidavit in reply (encl 3)) which remains uncontradicted. The plaintiff has acted inequitably and with impunity and on the facts, she is not a person in whose favour this court ought to strain the jurisdiction that has been invoked.

(3A) On the facts and circumstances in the instant case, there has been unconscionable conduct on the part of the plaintiff (see *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Seng & Anor* [1985] 2 MLJ 380 at p 384 and *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 9 4).

[13] Failure to disclose to this court that the plaintiff's application for modification of the proposed construction of the building on her land was rejected by a letter dated 29 April 1997 by the architect of the defendant (see para 5 of the affidavit affirmed on 26 September 1997 by the Mayor of Majlis Bandaraya Ipoh, exh MA-1 and attached to the defendant's (encl 3) affidavit). He who comes to do equity must disclose all the facts and background of the case which may assist the court in arriving at a just decision (see *Abdul Malik bin Abdul Majid v Asnah bte Hamid & Anor; Dagang bin Bachik v Abdul Malik bin Abdul Majid* [1985] 2 MLJ 459 at p 469 and *Law Pang Ching & Ors v Tawau Municipal Council* [2003] 3 MLJ 326 at p 335).

[14] Failure to make on oath a full and candid disclosure of material facts is of itself a ground for refusing the relief sought in the instant case. It is undesirable that the court should consider the plaintiff's application for an order of mandamus without knowing the facts on which it is based, Lord Denning MR in *Carl-Zeiss-in Stiftung v Herbert Smith & Co (a firm)* [1968] 2 All ER 1002 at p 1004 said: 'I always like to know the facts before deciding the law'.

[15] The court may refuse to grant the order of mandamus not only upon the merits but upon some delay or staleness of the case (see *The Queen v Church Warden of All Saints, Wigan & Ors* (1876) HL (E) Vol 1 611 at p 620).

[16] Despite the dismissal of the plaintiff's appeal by the Court of Appeal on 19 January 1998 against the decision of the High Court, Ipoh given on 18 August 1997, the plaintiff did not file this application (encl 3) until 6 April 2004 despite being aware and having had the benefit of legal advice on the outcome of the decision by Court of Appeal on 19 January 1998.

[17] The plaintiff herself is to be blamed for the limitation and the inordinate delay on her part and the defendant is not responsible for the limitation and the inordinate

delay. This court cannot speculate or surmise in order to supply the deficiency. The matter must be left where it is, unexplained and in the court's view to hold otherwise in the instant case, would be inconsistent with the whole course of decision in equitable relief cases and would revolutionise the settled law in this respect.

[18] In considering the background, facts and circumstances of the case which was canvassed at the High Court, Ipoh during the hearing of the application for injunction in Civil Suit No 22–88 of 1997 and clearly explained in the judgment of the High Court and confirmed by the Court of Appeal, the plaintiff still chose to file this application without having disclosed to this court the decision of the Court of Appeal which has a bearing and is directly relevant for the decision of this court in this application (encl 1).

[19] The plaintiff in applying for the order of mandamus must show utmost good faith and disclose all the relevant matters that would affect the court's decision either to grant or otherwise refuse the application for an order of mandamus. A court where it exercises equitable jurisdiction is a court of conscience and on the facts in the instant case, there is no reason for making the slightest concession in her favour

[20] The plaintiff has failed to comply with By-law 7 of the Uniform Building By-Laws 1984 and the onus is on the plaintiff to have informed the defendant of the change or substitution of the architect.

[21] There is an admission on behalf of the plaintiff that the relief sought by this application could have been included in the Civil Suit No 22–88 of 1997 but regrettably, the plaintiff still chose to file a separate and fresh mode of proceeding for this court to issue an order of mandamus against the defendant and this is certainly not encouraged and arguably tantamount to an abuse of the process of the court and would lead to duplicity or multiplicity of proceedings and embarrassment in the proceedings on the same subject matter of the land which has already been authoritatively decided by another court of co-ordinate jurisdiction on the injunction whose decision has been confirmed by the Court of Appeal.

[22] The process or machinery of the court should not be used improperly or abused. It would be wrong, therefore in the view of this court for the plaintiff to divide her case up into separate compartments to suit her own convenience and motive where the relief applied in the instant case admittedly could have been included and raised as a relief in the Civil Suit No 22–88 of 1997 or even by an amendment where the defendant in the instant case is also the first defendant in that civil suit which relates to the same subject matter of the said land so that the finality in litigation can be achieved at the minimum expense to the parties and bring a speedy disposal. Any two sets of proceedings in respect of the same subject matter and grievance of the plaintiff would be unnecessary and is an abuse of the process of the court and there must be some sense of finality to a judicial process.

[23] By the notice dated 29 April 97 as raised in para 5 of the said affidavit affirmed on 26 July 1997 by the Mayor of the defendant, it is clear that the plaintiff's previous

A architect Mr K Kasi has in fact been informed that the proposed modification to the original plans as submitted which included as addition the side windows cannot be considered and has been rejected.

[24] The reply and material averments affirmed on behalf of the defendant by the
B affidavit in reply (encl 3) remained uncontradicted and is deemed to have been admitted (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 322; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; *Dawkins v Prince Adward of Saxe of Wiemar* [1975-76] 1 QBD 499 and *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd* [1996] 3 MLJ 533 at p 541.
C

[25] This court declines to give its opinion on the views expressed by the High Court in Civil Suit No 22–88 of 1997 whether the plaintiff is entitled to damages or compensation as provided under s 25 of the Town And Country Planning Act 1976 where the application by the plaintiff herself for the modification of the original
D plans as approved previously is rejected when compared to a situation where the Local Planning Authority itself had ordered the approval of a building plan to be modified to such an extend as appears to it to be necessary. This court is not required to give its opinion for the purpose of this application which is now before this court as the trial of the Civil Suit No 22–88 of 1997 is pending at the High Court No 3
E and the High Court in the Civil Suit No 22–88 of 1997 in dismissing the plaintiff's application for the injunction has expressly left it open to the plaintiff to pursue her claim for damages and compensation as provided under the Town and Country Planning Act 1976 (see *Metal Industry Employees Union v Registrar of Trade Unions & Ors* [1976] 1 MLJ 220; *Saundres v The Holborne District Board of Works* [1895] 1 QB 63; *Barraclough v Brown* [1897] AC 613; *Pasmore & Ors v The Oswaldtwistle Urban*
F *District Council* [1898] AC 387; and *Wilkinson v Banking Corporation* [1948] 1 KB 721).

[26] On the totality of the facts, background and circumstances of this case, and for the reasons stated as above, this court finds it is not appropriate to grant the relief
G sought by the plaintiff being an order of mandamus against the defendant to issue the Certificate of Fitness pursuant to the application Form E under the Uniform Building By-Laws 1984.

OBSERVATION

H

[27] Observation by this court:

(1) However, by way of an observation, this court wishes to state that the officers of the local authorities at the Majlis Bandaraya must act with dedication and with a proper sense of responsibility when carrying out their statutory duties
I and be sensitive to owners of buildings who have already been granted planning permission to put a building on their land when considering a subsequent application by an adjoining land owner for building plans to be approved.

(2) The Majlis Bandaraya as a local authority is under a duty to act fairly to all parties and not at their whims and fancies or for an ulterior object and in total disregard to the written law. The officers of the Majlis Bandaraya must act in accordance with natural justice, equity and good conscience in the performance of their statutory duty under the Local Government Act and subsidiary legislations (see *Pyx Granite Co Limited v Ministry of Housing and Local Government* [1958] 1 QB 554 at p 572; *Hall and Co Ltd v Shoreham by-Sea Urban District Council* [1964] 1 WLR 240; and *Kingston-upon-Thames Royal London Borough Council v Secretary of State for the Environment* [1973] 1 WLR 1549 at p 1553).

(3) Rate payers have a legitimate expectation that the local authorities will act fairly, and not arbitrarily and not inconsistently towards them so as not to have a discriminatory effect upon any of them if it is found that it is accompanied by an element of unfairness or infringement of a land owner's right (see *Schmidt & Anor v Secretary of Stated for Home Affair* [1969] 2 Ch 149 at p 170; *Attorney-General of Hongkong v Ng Yuen Shiu* [1983] 2 AC 629; *R v Wear Valley DC; ex p Sinks* [1985] 2 All ER 699; *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134; *R v Secretary of States; ex p Kirk Stall Valley Co Ltd* [1996] 3 All ER 304; and *Re Findlay* [1985] AC 318 at p 338).

(4) It is of the utmost importance that officers of local authorities should not be encouraged to omit or neglect the fulfillment of their statutory duties, in the expectation that their neglect, omission, or delay will be condoned and their demands conceded. As observed by his Lordship, Dato' PS Gill in the Civil Suit No 22–88 of 1997 and graciously conceded by learned counsel for the defendant in that civil suit, where it is stated, 'Majlis Perbandaran should have been aware of the previous planning permission given to the plaintiff which may be infringed by the planning permission and subsequently given to the second defendant (Angkasamas Sdn Bhd)', the adjoining land owner. It is important to state that the observation of this court is confined only to the said statement of his Lordship where it was conceded by learned counsel for the defendant in that civil suit and also considered by the Court of Appeal.

[28] Be that as it may, having considered the affidavits, written and oral submissions and the authorities including the relevant statutes, the background of the case as submitted by both parties and having had viewed the whole scenario in its proper perspective, this court is of the view that on the facts in the instant case and for the reasons stated as above, it does not justify granting, the order of mandamus against the defendant to issue the Certificate of Fitness and the application (encl 1) ought to be dismissed. Accordingly, the originating summons (encl 1) against defendant is dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Peter Ling